No. 11768.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TREASURE COMPANY, a corporation, and SAMARKAND OIL COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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To the Honorable Justices of the United States Court of Appeals for the Ninth Circuit:

The appellants, Treasure Company, a corporation, and Samarkand Oil Company, a corporation, respectfully petition for a rehearing by this Court after its decision dated August 6, 1948.

The appeal in this case was taken from an order made by the District Court of the United States, in and for the Southern District of California, Central Division, denying appellants' motion of May 28, 1947, to dissolve and vacate the order of said District Court made January 27, 1948, restraining appellants from prosecuting in the Superior Court of the State of California, in and for the County of Los Angeles, two certain actions Numbered

505-967 and 505-968 by which plaintiffs therein sought to recover possession of certain personal property, or for its value, and for damages for its withholding.

Oral argument of this case was had before this Court on July 12, 1948, and the cause thereupon submitted.

On July 14, 1948, this Court made an order vacating such submission and directed the Clerk of the District Court to certify and transmit to the Clerk of this Court a supplemental record an appeal, including the following:

1. All docket entries in this case from March 26, 1946, to October 22, 1947;

2. The motion referred to in the notice of motion filed by appellants on May 28, 1947;

3. A transcript of all evidence taken and all proceedings had at the hearing or hearings on said motion;

[It may be noted a transcript of the proceedings on said motion is set forth at pages 197-266 of the Transcript of Record];

4. The order said to have been made and entered on August 4, 1947.

On July 30, 1948, counsel for appellants addressed a letter to the Clerk of this Court calling attention to the fact that upon the oral argument of this case the Court asked certain questions of counsel for appellants. This letter contained a statement of the views of counsel on such questions and concluded with the request that counsel be permitted to file a supplemental brief in which a discussion of such questions could be formally and more exhaustively presented after the filing of the additional record.

Counsel for appellants were thereafter advised by a letter from the Clerk of this Court under date of July 31, 1948, that if a supplemental brief were desired on the matters discussed in the letter above referred to it would be called for.

Thereafter and on July 28, 1948, such additional record was forwarded by the Clerk of the District Court to the Clerk of this Court but on August 6, 1948, without counsel for appellants being advised of this Court's desire in respect to a supplemental brief this Court rendered its decision in the matter.

Statement of Necessity for the Granting of a Rehearing and Statement of the Principles Involved.

This Court erred in its decision of August 6, 1948, in the following respects:

1. This Court failed to recognize and give effect to the rule at law that no recovery can be had in the condemnation action, No. 2454-B Civil, now pending in said District Court in which appellee is the plaintiff and the appellants are two of the defendants, for the taking deterioration, loss or withholding of personal property which occurred prior to January 12, 1944, the date upon which such personal property first became a part of the res of the condemnation action.

2. In holding that Section 265 of the Judicial Code (28 U. S. C. A. 379) was inapplicable to the State Court Actions Nos. 505-967 and 505-968, not-

withstanding the fact that it appears from the record on this appeal that it will be impossible to recover possession of the chattels described in said State Court actions and that only a money judgment can be obtained in such actions.

3. In holding that the trial court properly restrained the appellants from proceeding to trial in the State Court Actions Nos. 505-967 and 505-968 in so far as the personal property eliminated from the inventory attached to the amended complaint in the condemnation action is concerned.

It is necessary, therefore, that a rehearing be granted in this case in order that a decision may be rendered herein which is in harmony with the other decisions of this Court and the other Circuit Courts of Appeal of the United States and the Supreme Court of the United States.

ARGUMENT.

I.

This Court Failed to Recognize and Give Effect to the Rule at Law That No Recovery Can Be Had in the Condemnation Action, No. 2454-B Civil, Now Pending in Said District Court in Which Appellee Is the Plaintiff and the Appellants Are Two of the Defendants, for the Taking Deterioration, Loss or Withholding of Personal Property Which Occurred Prior to January 12, 1944, the Date Upon Which Such Personal Property First Became a Part of the Res of the Condemnation Action.

At the outset it is to be noted that the original resolution of the Defense Plant Corporation, dated September 18, 1942, authorizing the commencement of the condemnation action, afterwards numbered 2454-B was confined by its terms to the condemnation of land. [Tr. of Record pp. 77-78.] The original complaint filed September 28, 1942, in said condemnation action was by its terms also limited to the condemnation of land. [Tr. of Record p. 7.] The order of immediate possession dated September 28, 1942, under which appellee claimed the right to take possession of the personal property situated on the real property described in such order for immediate possession was likewise by its terms confined to land. [Tr. of Record p. 15.] The declaration of taking dated October 22, 1942, was likewise confined to land. [Tr. of Record, p. 22.] The decree of taking dated October 26, 1942, was also confined to land. [Tr. of Record p. 31.] There was never any order for immediate possession or decree of taking, or declaration of taking made in the condemnation action in respect to personal property. Notwithstanding such facts the personal property sought to

be recovered in State Court Actions 505-967 and 505-968 was seized by the Marshal and delivered to the Union Oil Company on September 28, 1942. This was clearly unlawful and immediately there arose a cause of action in favor of appellants for such unlawful taking and withholding.

The date of September 28, 1942, was clearly fixed as the date of the taking of the personal property involved in Actions 505-967 and 505-968 by the statement by Mr. Lieberman of counsel for Union Oil Company and Reconstruction Finance Corporation in open court upon the hearing of the petition of appellee for an injunction on June 10, 1946, when the following took place:

> "The Court: Mr. Lieberman, before you go I want to ask you a question. By the asking of it I don't want you to think that I am doing it in an argumentative way at all, or that I am taking any position, but just for enlightenment, that is all.
>
> The first taking was in November, 1943, I believe you stated?
>
> Mr. Lieberman: September 28, 1942.
>
> The Court: What is it?
>
> Mr. Lieberman: September 28, 1942, was the actual physical taking, and the date of the decree of possession. January, 1944, was the first time—
>
> The Court: What was the date in November?
>
> Mr. Lieberman: November is the date they brought suit.
>
> The Court: All right. I don't want that. Let me get this—
>
> Mr. Lieberman: November, 1943, is the date they brought suit.

The Court: Wait just a minute. When was the actual taking of the personal property?

Mr. Lieberman: September 28, 1942, personal and real were taken on that date.

The Court: When [was] the amendment made to the complaint?

Mr. Lieberman: January, 1944, the amendment which specified the personal property. January, 1944.

Mr. Weymann: January 12, 1944.

The Court: There was a period there of a year and some months. Now, during that time the possession was taken by the marshal; is that correct?

Mr. Lieberman: That is correct.

The Court: And the property was delivered to the Union Oil Company?

Mr. Lieberman: He turned it over to R. F. C., and they immediately turned it over to Union Oil Company." [Tr. of Record pp. 243-4.]

The first mention made of personal property in the condemnation action is found in the amendatory resolution of Defense Plant Corporation adopted October 4, 1943. [Tr. of Record pp. 81-82.] The language of this resolution is in part as follows:

> "Resolved Seventh, That it is necesary and advantageous in carrying out the authority vested in Defense Plant Corporation to acquire by condemnation the machinery and equipment described in said Exhibit 'C.'"

It is clear from this that the language of the resolution is in the present tense and cannot be construed to be a ratification of the taking of the personal property on September 28, 1942.

Inasmuch as the original resolution of September 8, 1942, the original complaint in condemnation and the order for immediate possession, the declaration of taking and the decree of taking above referred to, were all limited to land it is obvious that the taking of the personal property on September 28, 1942, was tortious and wholly without right.

Moreover, inasmuch as the original resolution, the original complaint in condemnation, the order for immediate possession and declaration and decree of taking were all limited to land nothing but land could be lawfully taken thereunder, and the taking of any machinery or other equipment, whether it be deemed to be attached to the land or not, was unauthorized for land is defined by Section 659 of the Civil Code of California as the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance.

It is essential to the protection of the interests of the appellants that a rehearing be granted by this Court in order that an opinion may be written which will set forth the above enumerated facts in regard to the limited purpose of the original complaint in condemnation, and thus enable the Supreme Court of the United States, in the event of an appeal to that Court, to determine whether the District Court abused its discretion in denying appellants' motion to vacate the order restraining the prosecution of State Court Actions Nos. 505-967 and 505-968.

The opinion of this Court rendered August 6, 1948, declares, "On September 28, 1942, the appellee, the United States, took for public use certain property, real and personal, in Los Angeles County, California," and that "At all pertinent times since September 28, 1942, ap-

pellee, by its agent, Union Oil Company, a corporation, hereinafter called "Union," has had possession of all property claimed by appellants."

While this statement does not indicate who actually took the personal property from the appellants it does declare that "Union" has had possession of the personal property claimed by appellants at all times since September 28, 1942. It is to be noted, however, that the answer of appellants to the appellee's petition for injunction in alleging the manner of the taking of the personal property sought to be recovered in State Court Actions 505-967 and 505-968 used the following language:

> "Allege that on or about September 28, 1942, Union Oil Company of California, a corporation, without lawful authority and without right, took possession of the personal property described in Exhibit 'B' attached to the petition, together with certain additional property belonging to these answering defendants; that at the time said Union Oil Company of California, a corporation, took possession of said personal property no resolution had been adopted by Reconstruction Finance Corporation authorizing the condemnation of said personal property nor the taking of possession of said personal property or any part thereof and that neither petitioner herein or Union Oil Company of California, a corporation, had any lawful right whatever to take possession of said personal property or any part thereof.
>
> * * * * * * * *
>
> "Admit the allegations contained in Paragraph V of said petition. Allege that said amended complaint was the first and only complaint filed to condemn the personal property and that until said action was filed, petitioner had no lawful right to take, hold or detain

any part of said personal property and any taking prior thereto by Union Oil Company of California or by petitioner was in fact unlawful." [Tr. of Record pp. 123-124.]

In the prior State Court Actions Nos. 489-318 and 489-319 referred to in the opinion by this Court and by which actions appellants herein sought to recover the possession or value of certain other personal property taken by "Union" under the same circumstances as the property involved in Actions Nos. 505-967 and 505-968 was taken, the Court found as follows:

"On the said 28th day of September, 1942 at and on said Block 33 of Tract 9809 in said County of Los Angeles, State of California, without the plaintiff's consent and against its will, a Deputy United States Marshal, without any authorization from any source, without process of court related to said personal property and without direction from any agency of the United States Government falsely and wrongfully and willfully assumed dominon over the said personal property, and wrongfully and willfully took possession thereof and wrongfully delivered said personal property to the defendant, Union Oil Company of California, a corporation, which said defendant on said date and at said place without right or authority wrongfully and willfully took possession of said personal property and thereafter continuously and until January 12, 1944 wrongfully and willfully held possession thereof and detained the same and wrongfully prevented the plaintiff Treasure Company, a corporation, from taking possession thereof." [Tr. of Record pp. 138-139.]

There is no contention made in the brief of the appellee nor upon the oral argument before this Court nor any suggestion contained in the opinion of this Court that such allegations and findings were not correct. In fact, we declared in our opening brief at page 62 as follows:

> "As indicated in the answers of the Union Oil Company filed in Actions Nos. 505-967 and 505-968, Actions Nos. 489-318 and 489-319 did proceed to a money judgment, which judgments have been paid and satisfied. It is likewise probable that each of the state actions, the prosecution of which is now sought to restrain, will terminate in a money judgment rather than a judgment for the possession of the property described in the complaints in said actions. In fact, no judgment excepting a money judgment can be rendered in Actions Nos. 505-967 and 505-968.
>
> * * * * * * * *
>
> "In this connection Judge McCormick said [Tr. p. 63]:
>
> " 'We conclude with the observation that the injunction to restrain proceedings in either of the state court actions is unnecessary under the record before us. In the local suits no relief to the oil companies other than money judgments appears to be now possible. Such an outcome in the state court would neither impair nor defeat the jurisdiction of this court in the condemnation proceeding.' "

The correctness of this statement is borne out by Finding No. 21 made by the Superior Court in the State Court Actions Nos. 489-318 and 489-319 which is as follows:

> "The court finds that at the time of the commencement of this action, and thereafter until and at all times after January 12, 1944, it was impossible for the defendant Union Oil Company of California, a corporation, to deliver said personal property of the plaintiff Treasure Company, a corporation, or any portion thereof to the said Treasure Company, a corporation in substantially the same condition as it was in when first taken and received by the defendant Union Oil Company of California, a corporation, as aforesaid. . . ."

This statement was not questioned by appellee in its brief or upon oral argument.

The only reason pointed out by this Court for reaching a different conclusion in respect to the appellee's petition of March 10, 1945, whereby it sought an order enjoining the prosecution of the State Court Actions Nos. 489-318 and 489-319 from that reached in respect to appellee's petition of March 26, 1945, whereby it sought an order restraining the prosecution of State Court Actions Nos. 505-967 and 505-968 is the fact that the first two cases mentioned were commenced prior to the filing of the amended complaint in the condemnation action on January 12, 1944, whereas the last two cases mentioned were commenced after the filing of such amended complaint.

It must be concluded, therefore, that the personal property described in the State Court Actions Nos. 505-967

and 505-968 was taken from the appellants by the United States Marshal without authority and by him delivered to "Union" and that only a money judgment can be recovered in such actions.

This Court declared in its opinion of August 6, 1948, that the personal property involved in the State Court Actions 505-967 and 505-968 did not become a part of the res in the condemnation action until January 12, 1944, the language of the Court in this connection being as follows:

> "Because Nos. 505967 and 505968 were brought after January 12, 1944, and involved property which, on January 12, 1944, became a part of the res in the condemnation proceeding, and because their prosecution would have impaired or defeated the District Court's jurisdiction of that part of the res, the District Court held that, as to those actions, Par. 265 was inapplicable and, on the basis of that holding, made and entered the order of January 27, 1947, enjoining appellants from prosecuting those actions. The holding that Par. 265 was inapplicable was clearly correct; for the case came within a recognized exception to Par. 265."

In view of this declaration by this Court it is apparent that the District Court obtained no jurisdiction over the personal property prior to January 12, 1944, and it is obvious that there was no taking by the Government prior to the filing of such amended complaint. The law is well settled that the award made by the Court in the condemnation action must be confined to the value of the property at the time of the lawful taking thereof by the

Government. This rule is announced by this Court in *United States v. Block,* 160 F. (2d) 604, at 607, as follows:

> "Even assuming that the machinery and equipment were taken on September 28, 1942, it does not appear that appellant was prejudiced by the fact that Rubin's and Rush's valuations were made as of October, 1942. Rush and Graydon Oliver, a witness for appellant, testified that the market value of the machinery and equipment in October, 1943, was substantially the same as on September 28, 1942. That testimony was not contradicted."

Subdivision 5 of Section 1244 of the Code of Civil Procedure of the State of California provides as follows:

> "The complaint must contain:
>
> 5. A description of each piece of land, or other property or interest in or to property, sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract or piece of property, or interest in or to property, but the nature or extent of the interests of the defendants in such land need not be set forth."

All statutory requirements in condemnation proceedings must be strictly complied with. The rule is stated in the *City of Los Angeles v. Glassell,* 203 Cal. 44, at page 46, as follows:

> "It requires no citation of authority upon the proposition that eminent domain proceedings are *in invitum*, and the same may be said of proceedings to assess and collect any outlay necessary to the establishment of parks and playgrounds under the act here involved: '. . . and the statutory authority (must) be strictly pursued, and every condition or

other prerequisite to the exercise of jurisdiction be observed, especially every requisite of the statute having the semblance of benefit to the landowner. . . .' (20 Corpus Juris, pp. 882, 883.)"

See also:

Harrington v. Superior Court, 194 Cal. 185, at 191.

The Court can make no award in the condemnation action other than for property which had been lawfully taken. (*Loomis v. City of Augusta,* 99 P. (2d) 988.

The State Court actions are described in the appellants' answer to the petition for an injunction as follows:

"Admit that Samarkand Oil Company, a corporation, filed action number 505-968, in the Superior Court of the State of California, in and for the County of Los Angeles, for the recovery of a portion of said personal property described in said inventory, or for its value, and for damages for its withholding." [Tr. of Record p. 125.]

A corresponding allegation is made in respect to Action 507-967. The taking in this case of the personal property prior to January 12, 1944, was without right and tortious and no recovery can be had against the United States on account thereof even in a proceeding initiated in the court of claims under the so-called Tucker Act. (28 U. S. C. A. 250.) By reason of the immunity thus created in favor of the Government it is not answerable for torts of its agents even though they be acting in the purported course of their employment.

In *Sloan Shipyards Corp. v. U. S. Shipping Board, etc.,* 66 L. Ed. 762, the Court said at page 768:

> "But the taking possession of the plaintiff's plants, on December 1, 1917, is alleged to have been unlawful; and it cannot be assumed at this stage that the act of the Fleet Corporation was in pursuance of any powers then delegated to it, or was within the ratification of December 3, 1918. The plaintiffs are not suing the United States but the Fleet Corporation; and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name."

See also:

United States v. Goltra, 85 L. Ed. 776.

It is to be noted that while the condemnation action is entitled "United States of America for the use of the Reconstruction Finance Corporation, a Federal corporation, acting in behalf of the Defense Plant Corporation, a Federal corporation," the United States of America is the only plaintiff against which a judgment can be rendered in such action. While Executive Order No. 9217 dated August 7, 1942, purports to confer upon the Reconstruction Finance Corporation the authority to exercise the power of eminent domain, such power can only be exercised by the Reconstruction Finance Corporation as trustee for the Government. This is pointed out in *Cherry*

Cotton Mills v. United States, 90 L. Ed. 835. The Court in speaking of the Reconstruction Finance Corporation said at page 838:

> "Its Directors are appointed by the President and affirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits if any go to the Government; its losses the Government must bear. That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely Governmental purposes."

It is obvious that the Court in the condemnation action could make no award for the loss, depreciation or unlawful withholding of personal property which occurred prior to the filing of the amended complaint. However, the agents of the Government by whom the personal property was wrongfully taken and detained are liable for such wrongful acts.

In *Philadelphia Co. v. Stimson,* 56 L. Ed. 570, the Court said at page 576:

> "If the conduct of the defendant constitutes an unwarranted interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded."

See also:

Kiefer v. Reconstruction Finance Corp., 83 L. Ed. 784.

It is clear from the opinion of this Court dated August 6, 1948, that the taking of the personal property on September 28, 1942, and prior to the filing of the amended complaint by which the personal property first became a part of the res of the condemnation action was tortious and that, therefore, there is no necessity for any further proceedings in the District Court for the purpose of determining whether such taking was wrongful. As the record clearly shows that such taking was unlawful, it is unnecessary to allow the injunction to continue in force until the trial court declares what already is obvious from the record herein, that the taking and withholding is and was unlawful.

II.

This Court Erred in Holding That Section 265 of the Judicial Code (28 U. S. C. A. 379), Was Inapplicable to the State Court Actions Nos. 505-967 and 505-968, Notwithstanding the Fact That It Appears From the Record on This Appeal That It Will Be Impossible to Recover Possession of the Chattels Described in Said State Court Actions and That Only a Money Judgment Can Be Obtained in Such Action.

Section 265 of the Judicial Code (28 U. S. C. A. 379), provides as follows:

> "379. (Judicial Code, section 265.) Same; stay in State courts. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. (R. S. 720; Mar. 3, 1911, c. 231, 265, 36 Stat. 1162.)"

The only exception to the rule thus stated is that in respect to actions *in rem.*

In the case of *Toucey v. New York Life Ins. Co.,* 86 L. Ed. 100, the Court in speaking of such exception to Section 265, said at page 108:

> "We find, therefore, that apart from congressional authorization, only one 'exception' has been imbedded in Sec. 265 by judicial construction, to wit, the res cases. The fact that one exception has found its way into Sec. 265 is no justification for making another."

And at page 106:

> "The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or portential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam,* involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

As above indicated, this Court in its opinion held that Section 265 of the Judicial Code was not applicable to State Court Actions 505-967 and 505-968 because they were commenced after the filing of the amended complaint in the condemnation action whereby such personal property first became a part of the res in such condemnation action and that the prosecution of such State Court ac-

tions would impair or defeat the jurisdiction of the District Court of that part of the res.

This Court erred in so holding for the State Court actions are not primarily actions *in rem,* and Section 265 of the Judicial Code is applicable unless the State Court actions are *in rem.*

The rule is stated in *Fredericks v. Tracy,* 98 Cal. 658, at pages 659 and 660 as follows:

> "Replevin (claim and delivery) is an action at law for the recovery of specific personal chattels, wrongfully taken and detained, or wrongfully detained, with damages which the wrongful taking or detention has occasioned. It is what we usually term a mixed action, being partly *in rem* and partly *in personam—in rem* so far as the specific recovery of the chattels is concerned, and *in personam* as to the damages."

As above indicated, we stated in our opening brief that no judgment can be recovered in the State Court actions except a money judgment. The prosecution of said Actions 505-967 and 505-968 cannot in any way impair or defeat the jurisdiction of the District Court in any respect for that Court has no jurisdiction to make any award for any damages accruing from the taking or withholding of the personal property prior to January 24, 1944. The District Court has no power to allow damages for the unlawful taking and withholding, and the actions restrained involve causes of action entirely distinct from those involved in the condemnation suit.

III.

This Court Erred in Holding That the Trial Court Properly Restrained the Appellants From Proceeding to Trial in the State Court Actions Nos. 505-967 and 505-968 in so Far as the Personal Property Eliminated From the Inventory Attached to the Amended Complaint in the Condemnation Action Is Concerned.

Paragraph I of the first separate defense contained in appellants' answer to the petition for injunction alleges in part as follows:

> "Allege further that under the statute described in plaintiff's petition, as well as in the Executive Order, Reconstruction Finance Corporation only has authority to condemn such personal property as is *'located thereon or used therewith that shall be deemed necessary, for military, naval, or other war purposes,'* and it appears from Exhibit 'B,' particularly pages 103, 104, 109, 110, 111, 112 and 113 that the personal property described therein are *'Items deleted from original inventory as indicated as not being needed in Playa Del Rey Project.'"* [Tr. of Rec. 130.]

The items belonging to Samarkand Oil Company which were deleted from the inventory as not being needed in the Playa Del Rey Project are described at pages 97 to 100, inclusive, of the Transcript of Record and the items belonging to Treasure Company which are deleted from the inventory as not being needed in the Playa Del Rey

Project are described at pages 108 to 118, inclusive, of the Transcript of Record.

Clearly the Court in the condemnation action has no jurisdiction to make an award in respect to the taking of such property because an award made in such action must be limited to property taken for a public use. In *United States v. Certain Lands in the City of Louisville,* 78 F. (2d) 684, the Court in speaking of the right of the Federal Government to exercise the power of eminent domain, said at page 686:

> "Equally well settled is it that the right can only be exercised where the property is to be taken for a public use."

Conclusion.

It appears from the record in the present appeal that the only decision that can possibly be rendered by the District Court upon the trial of the condemnation action in respect to the question of the legality of the taking of the personal property on September 28, 1943, including the pipe, machinery, appliances, equipment, tanks, structures, tools and supplies situated on the land described in the complaint in condemnation would be a decision to the effect that such taking was illegal, tortious and without right. This is so for the reason that whether such personal property be deemed affixed to the land or not the appellee had no authority at any time prior to January 12, 1944, to take or condemn anything but the land. Therefore the District Court would have no jurisdiction to make any award for the wrongful taking of such per-

sonal property on September 28, 1942, or for the loss, depreciation or withholding thereof which occurred prior to January 12, 1944, at which time the amended complaint was filed by which such personal property first became a part of the res of the condemnation action.

It follows that the District Court abused its discretion in refusing to grant appellants' motion to vacate the injunction restraining the prosecution of said State Court actions Nos. 505-967 and 505-968 and that this Court should grant a rehearing in this matter in order that an opinion may be written properly setting forth the facts upon which the District Court purported to act.

Respectfully submitted,

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